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SUPREME COURT, U.S.

No. 06-112

IN THE
SUPREME COURT OF THE UNITED STATES

HENRY TORROMEO and MDR CORPORATION,
Petitioners,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY

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QUESTIONS PRESENTED

The Respondent recharacterizes Petitioners' questions presented, so they bear repeating:

In *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005), four concurring Justices stated this Court's decision in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985), "may have been mistaken," because "[i]t is not clear ... that *Williamson County* was correct in demanding that ... the claimant must seek compensation in state court before bringing a federal takings claim in federal court." *San Remo*, 545 U.S. at 340.

1. **Must a takings claimant first seek and be denied compensation in state court, before bringing a federal takings claim in federal court?**

In *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005), this Court held that the "failure to substantially advance a legitimate government interest" formula from *Agins v. City of Tiburon,* 447 U.S. 255 (1980), "has no proper place in our takings jurisprudence" because it "prescribes an inquiry in the nature of a due process ... test ...." *Lingle,* 544 U.S. at 540. The lower federal courts are widely split over the standard of liability for a deprivation of property without due process.

2. **What is the proper standard of liability for a deprivation of property without due process?**

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I. THIS PETITION PRESENTS A QUESTION OF JURISDICTION OVER FIFTH AMENDMENT TAKINGS CLAIMS, NOT *RES JUDICATA.*

Whether *Williamson*'s state-litigation rule, as modified by *San Remo*'s simultaneous claims rule, bars the lower federal courts from *ever* adjudicating Fifth Amendment takings claims is an "important federal question," Sup. Ct. R. 10, which the Petition squarely presents. Respondent Town of Fremont attempts to pitch this case as simply turning on a state law issue of *res judicata*. Opp. 9-11. The Court should avoid that diversion. Whether the court of appeals properly applied claim preclusion depends precisely on whether Petitioners had a ripe federal takings claim for the state court to adjudicate. That, in turn, depends on *Williamson* and *San Remo*. If there was no federal takings claim in state court then claim preclusion is irrelevant, *regardless* of Petitioners' state court pleadings and citations. Only this Court can definitively resolve the conflict between its two leading opinions addressing federal jurisdiction over Fifth Amendment takings claims.

A. Petitioners' Fifth Amendment Claims did not Exist in the State Proceedings, and Thus the State Court Could not Have Possibly Decided Them.

As of 2000-2002 when Petitioners were in state court, both the First Circuit and the New Hampshire Supreme Court had unequivocally interpreted *Williamson* to mean that, as a matter of law, a Fifth Amendment takings claim *did not exist* until a state inverse condemnation suit ended and compensation was denied. Accordingly, under entrenched, widespread, and nearly unanimous lower court interpretations of *Williamson*, it was legally impossible for Torromeo and MDR to have brought Fifth Amendment claims in their state action.

In *Gilbert v. City of Cambridge,* 932 F.2d 51 (1st Cir.), *cert. denied,* 502 U.S. 866 (1991), the court of appeals

upheld a dismissal under Fed. R. Civ. P. 12(b)(6)—for failure to state a *claim*—because the property owners did not first repair to state court seeking compensation for inverse condemnation. *Id.* at 53. "*Williamson*, 473 U.S. at 194 n. 13 ... leaves no doubt that, so long as the State provides an adequate process for securing compensation, federal ... intervention in advance of resort to that procedure is premature." *Gilbert*, 932 F.2d at 64.

In *Deniz v. Mun. of Guaynabo*, 285 F.3d 142 (1st Cir. 2002), the court of appeals upheld a motion to dismiss Section 1983 takings and due process claims under Fed. R. Civ. P. 12(b)(1)—*for lack of jurisdiction*—due to lack of a prior state ripening suit. *Id.* at 144. Citing *Williamson*, the court wrote: "Thus, a takings claim ordinarily is considered unripe if the claimant comes directly to a federal court without first seeking compensation through state procedures." *Id.* at 146. The plaintiff was required to initiate litigation in the Puerto Rico courts, even though the Commonwealth had not yet made available an inverse condemnation remedy. *Id.* at 147.

In *Pascoag Reservoir & Dam LLC v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003), the court of appeals again upheld a finding that the property owners "fail[ed] to state a claim" (*id.* at 89), because they did not first bring an inverse condemnation action in the Rhode Island courts. "*Williamson County* requires the pursuit of state remedies *before* a taking case is heard in federal court." *Id.* at 94 (emphasis supplied).

Even prior to any of the First Circuit's holdings, in *Blue Jay Realty Trust v. City of Franklin*, 567 A.2d 188 (N.H. 1989), the New Hampshire Supreme Court had interpreted *Williamson* to prohibit state court jurisdiction over simultaneous state and federal takings claims. It found dismissal of a property owner's Section 1983 claims "was appropriate" because "it has fulfilled neither of *Williamson*'s conditions ...." *Id.* at 506.

Respondent's Opposition does not cite, much less analyze, any of these cases. Yet the Town cavalierly insists that "petitioners asserted both state and federal takings

claims in the state-court action." Opp. 11. How could this be, if Petitioners' federal claims did not yet exist while the state law claims were being litigated in state court? Surely, if Petitioners had raised Fifth Amendment takings claims in the state proceedings, the Town would have immediately moved to dismiss for failure to state a claim and/or lack of jurisdiction, or the state court would have acted *sua sponte*, following *Williamson, Gilbert, Blue Jay Realty*, and the law of just about every other circuit. See Pet. 8, n. 3.

Likewise, the salient point of these precedents—that *Williamson* makes it impossible to raise federal claims in an initial state action—escaped all scrutiny by the court of appeals. App. 6a-9a. It was wrong on the law to even address, much less decide, whether Petitioners "actually litigated" federal claims in state court. App. 7a.

It is difficult, if not impossible, to reconcile the pervasive interpretations of *Williamson* as deferring federal jurisdiction over Fifth Amendment claims, with *San Remo*'s directive that federal *and* state takings claims may be brought "simultaneously" in state court. *San Remo*, 545 U.S. at 338. Of course, *San Remo* had not yet been decided when Petitioners filed their state suits for compensation in 2000; only *Williamson* and its First Circuit and New Hampshire progeny were in effect. Whether *San Remo* has now overruled all of these cases, and whether *San Remo* can somehow be reconciled with *Williamson*, are questions for this Court to answer—and are presented by the court of appeals's decision. This is why a plurality of Justices concurred that the state-litigation rule "has created some real anomalies," "may have been mistaken," and should be "revisit[ed]." *San Remo*, 545 U.S. at 340. The Court may do so by granting the Petition.

B. Because Petitioners' Fifth Amendment Claims did not Exist in the Prior State Action, *Res Judicata* Could not Have Barred Them in the Subsequent Federal Action.

The inconvenient truth ignored by Respondents is that Petitioners had no federal takings claims when they pursued their state actions, as the precedent summarized *supra*, Section A, makes clear. Accordingly, the court of appeals erroneously applied *res judicata* to bar Petitioners' subsequent Fifth Amendment claims.

The Restatement (Second) of Judgments is on point. It has been persuasive authority for this Court,[1] and was also cited by the court of appeals. App. 7a, 9a. Section 26 provides exceptions to the rule that claims cannot be "split" into two separate suits. One of those exceptions, where a subsequent claim is *not* extinguished, is:

> (c) The plaintiff was *unable to rely on a certain theory of the case* or to seek a certain remedy or form of relief in the first action *because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories* or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief ....

Restatement (Second) Judgments § 26(1)(c) (1982) (emphasis supplied). Commentary further explains that when "formal barriers [against litigating a claim] in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first." *Id.*, comment c.

The state-litigation rule must qualify as a "formal barrier" under the Restatement. *Williamson*'s ripeness requirement operated against Torromeo and MDR to preclude Fifth Amendment claims in the New Hampshire courts. Ripeness is considered jurisdictional in nature. See

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[1] See *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503 (2001); *United States v. Mendoza*, 464 U.S. 154, 158 n. 3 (1984).

Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 807 (2003); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 733 n.7 (1997). An unripe Fifth Amendment claim could not have been raised in the state proceeding because the state court would have lacked the power to decide it. Accordingly, *res judicata* could not have possibly barred a federal takings claim in the later federal action. A few citations in Petitioners' state papers to the Takings Clause and *First English*, regarding the underlying remedy of just compensation (Opp. 9-10), prove nothing. Petitioners could not have manufactured state jurisdiction over unripe federal takings claims no matter what they pleaded or argued. Subject matter jurisdiction cannot be created by allegations in pleadings, consent of parties, or rules of procedure. *E.g., Kontrick v. Ryan,* 540 U.S. 443, 453 (2004); *Wisc. Dep't of Corrections v. Schacht,* 524 U.S. 381, 389 (1998); *Whitmore v. Arkansas,* 495 U.S. 149, 155-56 (1990).

In short, for claim preclusion to apply in the later federal action, there must have been a claim to preclude in the prior state action. There was none here, so the court of appeals wrongly invoked claim preclusion. The fact that the court of appeals dismissed Petitioners' federal takings claims on *res judicata* grounds therefore does not mean that this case presents a state law question. Rather, it demonstrates how *Williamson*'s state-litigation rule, compounded by *San Remo*'s simultaneous claims rule, prevents Fifth Amendment claims from being adjudicated *anywhere*, in *any* court, and foments litigation about litigation. Only this Court can divine the correct interpretations of *Williamson* and *San Remo*, and offer guidance so property owners and the lower courts know whether, where and how Fifth Amendment claims can be brought.

C. The Record Belies any Assertion That Petitioners Litigated Fifth Amendment Claims in State Court.

Sections A-B, *supra,* explain why it was legally impossible for Petitioners to have litigated federal takings claims in state court. In any event, as a factual matter, they did not.

In 2003, Torromeo and MDR petitioned this Court for a writ of *certiorari* following the New Hampshire Supreme Court's denial of compensation. At that time, the Town opposed on the ground that *Petitioners "waived" reliance on the Takings Clause by not asserting Fifth Amendment claims in the original state proceedings.* As the Town argued back in 2003:

> ... Petitioner's reliance on *Penn Central Transp. Co. v. City of New York,* U.S. 104 [sic], is misplaced. The Petitioners fail to cite the *Penn Central* case or its holding in its New Hampshire Supreme Court proceedings; *therefore, any argument based on that case has been waived and is not properly before this Court.*

App. 42a (emphasis supplied). Respondent cannot have it both ways. It should not be permitted to argue, as it finds expedient, that Torromeo and MDR "waived" federal takings cases in the state action, but now insist that Petitioners pressed their claims in state court—all to evade this Court's review.

In any event, Petitioners did not "actually litigate" Fifth Amendment claims in the state action. The undisputed record facts demonstrate that:

- The New Hampshire Supreme Court's opinion denying compensation for inverse condemnation contains not one word of federal law, and no discussion of whether the federal and state Constitutions provide equivalent property rights protections. App. 43a-49a. Indeed, the New Hampshire Supreme Court believed it is "not bound to adopt the federal interpretations," and its inverse condemnation decisions are based "on articulated adequate and independent *State* grounds." *State v. Ball,* 471 A.2d 347, 351 (N.H. 1983) (original emphasis).

- Respondent framed its appeal to the New Hampshire Supreme Court, based entirely on state law, with no reference whatsoever to a federal issue, law, or case. App. 50a-57a.
- The New Hampshire trial court awarded compensation, prior to being reversed. It relied on no federal law. App. 58a-68a.
- Petitioners' state complaints did not rely upon 42 U.S.C. § 1983, the vehicle by which aggrieved parties obtain a monetary remedy for federal constitutional violations committed by municipal actors. App. 75a-83a.

Yes, Petitioners cited the Takings Clause and *First English* in state court papers. Opp. 9-10. This was necessary to lay the foundational principle that the payment of compensation—not invalidation of the offending government action—is the "self-executing" remedy that the Fifth Amendment requires and establishes as a minimum national standard of constitutional protection. *First English,* 402 U.S. at 315-316. Respondent, however, would concoct a game of "Gotcha!," in which any mere reference to this Court's Fifth Amendment jurisprudence in state inverse condemnation litigation would result in claim preclusion. It effectively argues that a takings claimant's citation to a single federal case in state court means that a Fifth Amendment claim is being litigated, and is thereafter foreclosed from federal court. That is absurd.

And yes, Torromeo and MDR premised their 2003 petition for a writ of *certiorari* on arguments that the New Hampshire Supreme Court contravened and ignored this Court's Fifth Amendment case law. Opp. 10. Of course, this Court frequently reviews state supreme court opinions. See Sup. Ct. R. 10(c) (*certiorari* may be granted where "a state court of last resort has decided ... an important federal question in a way that conflicts relevant decisions of this Court"). Torromeo and MDR thus argued that the New Hampshire Supreme Court, interpreting state law, violated Fifth Amendment standards. Raising Fifth Amendment issues in the initial *certiorari* petition has no bearing on

whether Petitioners did, or even could have, pressed their Fifth Amendment claims in state court.

D. Respondent's Issue Preclusion Argument is Smoke and Mirrors.

For the very first time in this federal action, Respondent decided to raise issue preclusion (or collateral estoppel) as a defense. Opp. 11. It is much too late. Issue preclusion is an affirmative defense. Fed. R. Civ. P. 8(c). As such, it is waived unless pleaded in an answer or raised in a pre-answer motion to dismiss. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971); *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 505 (1st Cir. 1996). Respondent waited far too long to mount any possible issue preclusion defense, so it is waived.

While issue preclusion is beyond the scope of this case and the Petition, an argument in the Opposition concerning that doctrine warrants clarification. Respondent asserts that *San Remo* "makes clear" that *res judicata* bars an attempt to relitigate a subsequent Fifth Amendment claim in federal court. Opp. 12. That is incorrect. The question decided by *San Remo* concerned *issue* preclusion, not *claim* preclusion. *San Remo*, 125 S.Ct. at 2504 ("The relevant question ... is whether the state court actually decided an issue of fact or law that was necessary to its judgment"); *id.* at 2505 ("[W]e are presently concerned only with issues actually decided by the state courts that are dispositive of federal claims raised under § 1983"). The Respondents in *San Remo* conceded that to apply claim preclusion in a later federal action would unfairly extinguish Fifth Amendment rights. Brief of Respondent at 26-28, *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) (No. 04-340).

Accordingly, the extant split in the circuits on the application of *claim* preclusion (see Pet. 15-17), which the court of appeals widened in the candidate decision for review, survives *San Remo* and should be resolved. In fact, since *San Remo*, one of the circuits has overcome claim

preclusion in the takings context, by allowing reservation of a Fifth Amendment cause of action for subsequent federal adjudication after *Williamson*-mandated state proceedings. *Bauknight v. Monroe County,* 446 F.3d 1327 (11th Cir. 2006).

E. The Petition Places *Williamson*'s State-Litigation Rule Front and Center.

Petitioners and their supporting *amici* have amply documented the confusion in this Court's takings ripeness cases, the conflict in the lower courts on Fifth Amendment jurisdiction, and the exasperation of academics and practitioners against the state-litigation rule. We have highlighted the call from the *San Remo* concurrence, where four Justices recognized that *Williamson* must be revisited and its anomalies clarified.

One of Petitioners' *amici,* Franklin P. Kottschade, previously sought intervention from this Court on the takings jurisdictional question presented here. Mr. Kottschade filed his Section 1983 takings claim *directly* in federal court. The Eighth Circuit dismissed his case for failure to pursue initial state inverse condemnation litigation. This Court denied review. *Kottschade v. City of Rochester,* 319 F.3d 1038 (8th Cir.), *cert. denied,* 540 U.S. 825 (2003).

Now, in light of *San Remo*'s direction that state and federal takings claims may be brought simultaneously in state court, against *Williamson*'s backdrop that a federal takings claim is not ripe if initially brought in federal court, no takings claimant in his or her right mind will ever file a Fifth Amendment case initially in federal court. Aggrieved property owners will only file federal takings claims in state court. They may be removed to federal court by a municipal defendant à la *City of Chicago v. Int'l College of Surgeons,* 522 U.S. 156 (1997), only to be bounced back to state court à la *Koscielski v. City of Minneapolis,* 435 F.3d 898 (8th Cir. 2006). But even if a takings claimant is not ping-ponged between state and federal courts under such a

patently unfair removal scenario, and brings a federal court takings claim after state litigation, a circuit court of appeals will surely apply one of the preclusion doctrines—as the First Circuit did here—to bar subsequent federal review of the Fifth Amendment action.

As a practical matter, therefore, the only way this Court will be able to address *Williamson* and *San Remo* is in a case where a takings claimant (1) files in state court, (2) loses, (3) then files in federal court, and (4) is dismissed on issue preclusion, claim preclusion, or perhaps abstention. *That is this case.* Contrary to Respondent's assertion (Opp. 13), this kind of case is the only "vehicle" in which *Williamson* will ever, realistically, be reconsidered. The time is ripe, with this Petition, to revisit the state-litigation rule.

II. THE STANDARD FOR DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS MUST BE CLARIFIED.

The Opposition proves Petitioners' point that the opinions of this Court and the lower courts conflict on the correct standard to apply when government action deprives property without due process. All of the cases it cites define the due process standard as "egregious and arbitrary conduct," or "used for the purposes of oppression," or "shocks the conscience." Opp. 14-15. It also recognizes that *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), uses a "substantially advances" formula. Opp. 17. Which is the standard? Do they mean the same thing? Only this Court can say for sure.

CONCLUSION

For all of the foregoing reasons, and for the reasons presented in the Petition, the Court should address the state-litigation rule and decide the proper standard of liability for a deprivation of property without due process.

September 5, 2006

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